

1 into signing these agreements; right?

2 A It's certainly a market share that would be
3 consistent with you having market power, yes. When I look
4 at the rates, then, of course, it's clear that you're
5 exercising that market power. And when I look at the
6 competitive -- the competitive activity that is occurring
7 under those rates, it's obvious as to why you would want to
8 -- to exercise that market power. Your own CFO has told
9 Wall Street you expect to get all these customers back.
10 It's just inconsistent with your CFO going to Wall Street
11 and telling them, under Securities Exchange disclosure laws,
12 that you expect to get all these customers back as retail,
13 you know --

14 CHAIRMAN WISE: Can you document that, Mr. Gillan?

15 THE WITNESS: Yes, it's in my testimony.

16 Ironically, I opened it to the page. Page 41.

17 CHAIRMAN WISE: In what context was that said?

18 THE WITNESS: There was a Wall Street analyst
19 meeting that Reuters was covering. The -- we can provide a
20 copy of the article. Each of the -- a variety of CFOs were
21 addressing them as to the likely fallout from having the
22 Commission's TRRO decision. And that was the -- the
23 statement attributed to I think it was Mr. Dykes.

24 BY MS. FOSHEE:

25 Q Mr. Gillan, for that to be true, BellSouth's

1 retail lines would have had to increase over the last year-
2 and-a-half; right?

3 A No.

4 Q How no?

5 A Well, because, wholly aside from this, you are
6 experiencing some decay in your retail lines as people get
7 rid of second lines, go to DSL service, some -- some have
8 gone to wireless, some have gone to some cable providers.
9 So you have some decay in your retail lines generally. So
10 the fact that you're seeing UNE-P lines go back to you
11 doesn't necessarily mean that you're going to see a net gain
12 in your retail lines unless the loss is being offset by the
13 -- by the gain.

14 Q So, despite the fact that the data, in fact, shows
15 over the last year-and-a-half that BellSouth's retail lines
16 have declined, you still take the position that we have
17 somehow driven these folks out of business by taking all
18 these UNE-Ps back; right?

19 A Well, the point is, is that carriers are dropping
20 out of the UNE-P business. There's no -- I mean, this isn't
21 like we're debating it. This is a fact. I mean, AT&T's
22 announced it, MCI's announced it, ITC^DeltaCom has supplied
23 that to you in a discovery response. Those -- the lines
24 don't go away. And since you're basically the other choice
25 available to these customers, they're either going

1 -- they're going to you; or, in rare instance, they may be
2 going to a cable company or just giving up phone service
3 altogether.

4 But what we're generally talking about in the UNE-
5 P marketplace is POTS customers. And that was how people
6 provided POTS in competition to you. And, by and large, the
7 only provider of POTS service is you.

8 Q And your testimony is that it's a rare instance
9 that people are giving up their wire line phone altogether?
10 Is that right?

11 A It's a relatively rare instance. It's around -- I
12 believe the last set of studies that I've seen from the
13 Census Bureau, and actually the Centers for Disease Control,
14 which is a whole separate issue, indicates that it's -- it's
15 somewhere in the six to ten percent range. It's heavily
16 concentrated in younger populations. I think it's something
17 like 40 percent of the people who have given up their cell
18 -- have given up a wire line phone for a cell phone have a
19 roommate. So, I mean, you -- you kind of understand the
20 demographic that we're talking about.

21 It is occurring, yes. Is it occurring among a
22 relatively small population group? Yes, according to at
23 least studies done by unbiased agencies.

24 Q Let's go back to the members of CompSouth that you
25 contend you know. Not one of the eight CompSouth members

1 who did not sign a commercial agreement filed testimony in
2 their proceeding -- in this proceeding that they were
3 coerced to sign this agreement, did they?

4 A Coerced? Well, no. But I think you're -- you're
5 -- you're using the word "coerced." I never used the word
6 "coerce." I used the word "no choice," "no option."

7 Q Okay.

8 A "Coerce," to me, would be you and Guido show up
9 and, you know, with a blackjack you get them to sign it. On
10 the -- the alternative is you just show up with your lawyers
11 and a \$7 rate and the guy looks around and sees no other
12 option. It's a form of coercion, but I wouldn't use the
13 term.

14 Q Is there any one of the eight clients who you
15 purport to represent that is -- that has signed a commercial
16 agreement, that's here testifying that they had no choice
17 but to sign our agreement?

18 A Well, each -- all of the -- all of the companies--

19 Q Yes or no, please, and then you can explain.

20 A I am their witness. So all of them are here
21 testifying as to the facts in my testimony.

22 Q But none of them have said, "I, CLEC X, had no
23 choice but to sign this agreement"; correct?

24 A Ms. Foshee, there is not a single provider of
25 wholesale local switching in the southeast. Not one. So

1 the -- there is no question that if they wanted to continue
2 to serve this customer base by leasing switching, that there
3 is only one place to buy. You.

4 Now, their other option is to abandon the customer
5 base high and dry, pull out of the marketplace. We can
6 argue semantics as to whether that's no choice or they had a
7 choice to just walk away from the market entirely. But the
8 fact doesn't change. You are the only provider of wholesale
9 switching in the BellSouth region, general -- you know,
10 generally. And you're certainly the only provider that has
11 all these loops connected to those switches so that a
12 customer can change service providers without them having to
13 go through physical service rearrangements.

14 Q And the analysis you just underwent ignores self-
15 deployment, which is the fact upon which the FCC relied to
16 find no impairment; right?

17 A Yes. But that's also why the FCC can't possibly
18 have concluded that there's enough competition to -- to
19 protect customers and carriers from your pricing decisions,
20 because all of the lines we're talking about aren't being
21 self-deployed. They're lines that are being served on your
22 switches.

23 Q Okay.

24 A And they're carriers in this that are seeking a
25 way to serve those lines without self-deployment.

1 Q But you do agree that the FCC found, and it is now
2 a fact, that the -- that CLECs could self-deploy switching;
3 correct?

4 A Well, I'll -- I'll agree that the FCC --

5 Q Is that yes or no?

6 A No. I will agree only that the FCC found that. I
7 will not necessarily agree that that made it a fact.

8 Q Okay. Excuse me one second.

9 Now, what I want to do, and the reason that this
10 issue of this alleged arm's length negotiation is important
11 is because it takes us to paragraph 664 of the triennial
12 review order. Do you have that in front of you?

13 A Yes. It might take us there.

14 Q Okay.

15 MS. FOSHEE: Mr. Chairman, I apologize. My nanny
16 is sick, so my children are at various locations, which is
17 why I have my phone on. I turned it off.

18 CHAIRMAN WISE: You had to farm them out?

19 (Laughter.)

20 MS. FOSHEE: Basically, anyone who would take
21 them.

22 BY MS. FOSHEE:

23 Q Okay, paragraph 664 of the TRO. Can we agree that
24 the FCC said that the existence of an arm's -- of arm's
25 length commercial agreements can prove that the rates in

1 those agreements are just and reasonable?

2 A It might be able to prove it.

3 Q And it proves it, in fact, if the agreements are
4 arm's length; correct?

5 A No.

6 Q Okay, what else is it that you have to show?

7 A Well, the entire phrase says, "might satisfy the
8 standard." It doesn't indicate what conditions would be
9 needed for it to be able to satisfy it. An economist would
10 say if there was sufficient competition among providers of
11 wholesale switching, for instance, that you believe that
12 that competitive market was producing a just and reasonable
13 rate, then a B-O-C, a BOC, BellSouth, might be able to
14 satisfy the standard with that kind of evidence.

15 But that type of analysis would require that
16 BellSouth be a price taker. I mean, I'm sure you've heard
17 that term in principles of economics, that in a competitive
18 market firms are price takers.

19 You're not a price taker. You can't find a single
20 carrier, nor can I, against which you compete. You didn't
21 take the price from the market, you set a price.

22 Q And what that goes to, Mr. Gillan, is the question
23 of whether they are arm's length agreements; right?

24 A I think it partially goes to that. But the FCC
25 doesn't say, "might satisfy this standard, but it has to be

1 -- it all hinges on whether it's arm's length." I mean,
2 certainly that's part of what it would have to be. But I
3 think it goes beyond. I mean, and part of arm's length
4 requires that carriers, purchasers have choices and
5 alternatives. So it essentially we might be saying the same
6 thing.

7 Q Right.

8 A But it goes back to you might be able to prove
9 this if you were able to prove a competitive market. You
10 did not prove a competitive market; you didn't even attempt
11 to prove a competitive market in this proceeding, nor
12 elsewhere, ever. You've never found another carrier.

13 Q Okay, I understand that your position is that they
14 have to be -- in order to be an arm's length agreement, you
15 have to have what you call the competitive market. But can
16 we agree that the FCC has said that the test is that if you
17 have arm's length agreements with similarly situated
18 purchasing carriers, that proves that the -- that the rates
19 in those agreements is just and reasonable; right?

20 A No. No, Ms. Foshee. And I realize that the term
21 "might" is disturbing to you. But the term "might"
22 characterizes the entire standard. There might be
23 conditions where that would be sufficient. The FCC did not
24 articulate all the conditions or any of the conditions,
25 really, as to what would -- as to what conditions would be

1 necessary for that type of proof to be satisfactory.

2 I'm telling you as an economist that that would be
3 true if you were in a competitive marketplace; but a
4 competitive marketplace would be driving your rates towards
5 cost. And as even Dr. Taylor acknowledged, they would
6 likely be driving your rates towards incremental costs, not
7 average costs. And, in effect, the rate we're proposing is
8 higher than that incremental cost, so it's likely higher
9 than the rate you would pay in a competitive marketplace.

10 But we don't -- we don't even have a dispute here
11 as to whether there's a competitive marketplace. You can't
12 have a competitive market without any competitors. And
13 that's the situation that you find yourself in.

14 Q Well, under your analysis where the only thing
15 that is a competitor is another provider of wholesale
16 switching; right? I mean, you utterly ignored self-
17 deployment; correct?

18 A I'm ignoring self-deployment for purposes of
19 establishing a market price for switching for carriers that
20 are looking for a wholesale provider. The dispute here is
21 that you are obligated, under Section 271, to be a wholesale
22 provider of switching. You want to claim that your rates
23 are just and reasonable, even though there are no other
24 providers, and you didn't look at any market information
25 from those other providers to set the rate.

1 I do not believe that self-deployment is
2 sufficient or the threat of self-deployment is at all
3 sufficient to justify -- to constrain you from charging
4 unreasonable prices. In fact, if self-deployment was really
5 such a great constraint on your behavior, we wouldn't see 91
6 percent of these lines signing up with you to buy switching.

7 Some of them would be going -- a big chunk of them would be
8 going to some other provider. Why would somebody who can
9 self-provide not open up their switch to other wholesalers?

10 There's obviously a problem here. And I don't think it's
11 plausible at all to believe that the threat that someone
12 will go out and self-deploy a switch is sufficient to police
13 you from charging unreasonable rates for switching.

14 Q So you disagree with the FCC, I think it's fair to
15 say; right?

16 A Oh, that's absolutely unfair to say. Because the
17 FCC never reached the conclusion that you're trying to
18 assert here. The FCC never said self-deployment was going
19 to create sufficient competition to police your pricing
20 behavior. The FCC only pointed to self-deployment for non-
21 impairment. And non-impairment is not the same as there's
22 enough competition in the marketplace for wholesale inputs
23 to prevent BellSouth from having market power in that
24 marketplace.

25 Q What number of commercial agreements, in your

1 opinion, would have been the right number?

2 A I don't think that you can count the number of
3 commercial agreements. I think --

4 Q I mean, I assume if we had zero you would have
5 said, "Well, of course you have zero. Your rate's too
6 high."

7 A That would probably be an answer. But I think --

8 Q You know, we have -- we have --

9 A -- if you'd let me answer instead of answering for
10 me --

11 Q Sorry.

12 A -- I don't -- as I've indicated in the testimony,
13 counting commercial agreements is never going to tell you
14 anything. I think you have to look in and say, "All right,
15 what is happening in this market?" Because counting
16 commercial agreements is -- leads you to exactly the
17 falsehood that you're identifying. Zero says that your
18 price is so high, no one is even bothering. But having all
19 the commercial agreements is also a sign of market power,
20 which means you have the ability to charge prices that are
21 too high.

22 So I believe you have to look into that
23 marketplace, look at those prices, make a judgment as to
24 whether they're reasonable or not against the cost measure.
25 Are these monopoly type prices, or are these competitive

1 type prices? And part of that is: What's happening to the
2 lines in the marketplace? In this instance you've had
3 450,000 of these lines disappear in six months. Not
4 disappear, but drop off from commercial agreements. Now,
5 that's an enormous reduction in competitive activity.

6 The -- the fact here is, is that there is a price
7 at which you are effectively avoiding your obligation to
8 provide local switching. The consequence to you -- for you
9 of charging prices that are too high is not that you have
10 less profit than you would have; it's that carriers can't
11 compete, they can't serve the customer, and the customer
12 comes back to you. As long as that's the incentive
13 structure here that -- that the consequence to BellSouth
14 from charging prices that are too high is that they just get
15 the customer back, then there's no effective police
16 mechanism here, and that's why we're here before the
17 Commission.

18 Q Mr. Gillan, I'm going to ask you a "yes or no"
19 question, and I need you to answer it that way, and then you
20 can explain.

21 Did the FCC put forth a possible test that said if
22 there are -- if there are arm's length commercial agreements
23 in existence, that can prove that the rate in those
24 agreements is just and reasonable? Yes or no.

25 A Yes, they identified that as a possible test.

1 Q Okay. Now, we don't have in this proceeding,
2 other than you, any CLEC, whether it's one of the eight
3 CLECs who don't -- doesn't have a commercial agreement,
4 represented by you, or any of the other almost 150 CLECs who
5 have signed these agreements, in here testifying that they
6 didn't have a choice; that they signed this because they had
7 no choice; right?

8 A I am the only witness for all the active CLECs in
9 the regulatory arena in -- in Georgia, to my knowledge.

10 Q Oh, so you're representing more CLECs than those
11 that are in CompSouth?

12 A I said the CLECs that, to my knowledge, are active
13 in regulatory issues. Those are the ones who have generally
14 come together under CompSouth. There may be other CLECs
15 that periodically appear before the Commission. But in
16 terms of the -- the CLECs that have banded together to
17 represent the competitive position, I am their
18 representative today.

19 Q Are you aware that for a period of time this
20 Commission reviewed and approved BellSouth's commercial
21 agreements as 252 agreements?

22 A I'm aware that you've alleged that they've
23 reviewed and approved them, yes.

24 Q Oh, so it's your contention that they didn't
25 review them before they approved them?

1 A I am aware that there is a claim that they
2 approved them. I'm not aware as to what level of review
3 they conducted to them.

4 Q Okay. Do you agree that Section 252 requires
5 negotiated agreements to be in the public interest to be
6 approved?

7 A I need to see Section 252.

8 Q Okay.

9 A I think that's correct, but I'd like to see it.

10 Q Sure. It's 252(e), "Approval by state
11 commissions. An agreement (or any portion thereof) adopted
12 by negotiation" under this subsection -- you may only reject
13 it if an agreement adopted by negotiation, "the
14 implementation of such agreement or portion is not
15 consistent with the public interest, convenience, and
16 necessity."

17 So can we agree that to approve an agreement under
18 250 -- a negotiated agreement under 252, it must be
19 consistent with the public interest, convenience, and
20 necessity?

21 A Well, it's actually written in the negative. I
22 mean, I'm not going to argue the semantics with you.
23 Obviously this says what it says. But Congress chose to
24 write it in terms of what type of standard they've had to
25 find in order to reject. They didn't actually write it in

1 terms of what you had to do in terms -- to approve it.

2 Q Okay. Can we agree that a state commission may
3 only reject a negotiated agreement if the implementation of
4 such agreement is not consistent with the public interest?

5 A Yes, that's what this says.

6 Q Okay. Now, you've testified here enough, I'm
7 sure, that you're familiar with the pricing standard in
8 Georgia.

9 A Can you direct me to something?

10 Q Sure.

11 MS. FOSHEE: I can speed this up if I can approach
12 the witness.

13 Q What I'm directing you to is O.C.G.A. 46-2-23,
14 which is the rate-making power of the Commission and special
15 provisions concerning telecommunications companies. If you
16 see subsection (a) of that statute it says, "The Commission
17 shall have exclusive power to determine what are just and
18 reasonable rates and charges to be made by any person, firm,
19 or corporation subject to its jurisdiction."

20 A That's what this says --

21 Q Okay.

22 A -- in its partial copying form.

23 Q Okay. So the state law in Georgia sets the
24 pricing standard in Georgia as just and reasonable; correct?

25 A Yes. It's not uncommon for most state public

1 utility statutes to adopt the just and reasonable standard.

2 Q Sure. Absolutely.

3 So we've got 252 which requires to be approved;
4 and that an amendment, must be in the public interest.

5 A May only reject.

6 Q Okay. Under Georgia law, the prices must be just
7 and reasonable. And so, therefore, wouldn't you agree that
8 agreements approved by this Commission, to be consistent
9 with the public interest, had to meet the pricing standard
10 of just and reasonable?

11 A No, I don't actually -- I don't actually think
12 that -- I think you just conflated, if that's the way that
13 word is actually pronounced and/or spelled. I'm not sure
14 that the requirements of 46, dot, 2, dot, 23 which is in
15 state law actually apply to decisions rendered under the
16 federal act. Normally you would object to me answering this
17 question, instead of asking it.

18 But I'm not entirely clear, based on my limited
19 legal knowledge, that the state law standard actually
20 supercedes the federal process under 252. I kind of thought
21 that there were times the Commission operated under its
22 state law, and some times that it operated under its federal
23 law.

24 MR. WALSH: Mr. Chairman, at this point could I
25 ask, if we're going to look at part of this statute, that we

1 look at the entire -- the entirety of this provision. The
2 remainder of the statute actually talks about -- the entire
3 thing in Section (b) talks about that the commission is not
4 required to fix and determine specific rates, tariffs, or
5 charges for the services offered by the telecommunications
6 companies, and looks at the factors that the commission's
7 going to consider. I think if we're going to ask the
8 witness to look at a particular provision for the record, it
9 should -- the witness should have the entire statute.

10 CHAIRMAN WISE: Would you like for Mr. Gillan to
11 look at the entire thing, or just take notice?

12 MR. WALSH: I think that the witness should have
13 the opportunity to look at the entire -- entire statute.
14 The Commission can take notice.

15 CHAIRMAN WISE: You know, Mr. Walsh, it's great
16 that -- that you're protecting Mr. Gillan here. But I think
17 he's done a -- you know, I think he does a pretty good job
18 himself. He's got his counsel here with him. Unless
19 -- unless you think the Commission needs protecting. And
20 I'm -- I'm not sure that we're going there.

21 MR. WALSH: Okay. I just --

22 MS. FOSHEE: Thank you, Mr. Chairman.

23 MR. WALSH: -- for the record that --

24 CHAIRMAN WISE: We'll take notice of the entire
25 opinion.

1 MR. WALSH: Okay.

2 MR. MAGNESS: I'd just say we'll -- I mean, we
3 certainly have no problem taking notice of the entire
4 section. I think if Mr. Gillan has any problem protecting
5 himself, we have the statute book and we can show them to
6 him if this line of legal question continues. But he seems
7 to be doing okay so far, so --

8 MS. FOSHEE: Would -- would anybody else like to
9 object?

10 (Laughter.)

11 MS. FOSHEE: Okay.

12 CHAIRMAN WISE: Note the laugh, as well, Ms.
13 Foshee.

14 MS. FOSHEE: Yeah, thank you. Please put that in
15 the record.

16 BY MS. FOSHEE:

17 Q Okay, let me ask it this way, Mr. Gillan. Is it
18 your testimony that this Commission would have approved
19 rates for the consumers in Georgia that were unjust and
20 unreasonable?

21 A Certainly not knowingly. I mean, the issue here
22 is obviously you file things and the Commission allowed them
23 to -- treated them as approval. Did not reject, you know.
24 We're using this -- the language in the statute.

25 I am not going to go anywhere near a statement

1 that says that the Commission has rendered a judgment that
2 either compels it to follow that precedent here, or really
3 means that the Commission looked at those rates and made a
4 judgment as to whether they were reasonable. Yes, you have
5 the point that in the statute the Commission should -- would
6 have rejected, had it found that they weren't in the public
7 interest. But I think, let's be honest here, it was a much
8 more neutral action than that. And this is the case where
9 we're investigating whether those prices are reasonable.
10 And near as I can tell, there is only one set of evidence
11 that even addresses the prices in this proceeding, and it's
12 showing that those rates are not reasonable.

13 Q Let's look at loops and transport. I believe you
14 said in your summary something to the effect of that the use
15 of special access for loops and transport was just wrong. I
16 want to go back and look at paragraph 664 again. And
17 understanding, of course, that the paragraph has the word
18 "might," can we agree that the FCC said that a RBOC might
19 prove that its rate for loops and transport is just and
20 reasonable if it is at or below the rate at which the BOC
21 offers comparable functions to similarly situated purchasing
22 carriers under its interstate access tariff.

23 A Yes, it says that.

24 Q Okay. So that is a test that the Commission could
25 use?

1 A It is a -- it is a possible way to analyze the
2 rates, yes. And my testimony goes into an extensive
3 discussion as to why that possible way should be rejected.
4 But it is a way that the FCC identified.

5 Q Now, we can agree, I assume, that tariffs under
6 federal law, such as interstate special access tariffs, must
7 be just and reasonable; correct?

8 A For the purpose for which they were set, yes.

9 Q Okay.

10 A Of course, the purpose for which they were set is
11 not local competition.

12 Q What about intrastate tariffs? Can we agree that
13 under Georgia law intrastate tariffs must be just and
14 reasonable? Yes or no, please.

15 A Well, based on the partial legal citation you
16 provided me, it would suggest that. I have not analyzed the
17 Georgia law.

18 Q Okay.

19 A But, again, special access was used for a very
20 different purpose than as a input to carriers attempting to
21 compete with BellSouth in the provision of local exchange
22 services. And even a finding of just and reasonable for one
23 thing doesn't mean that it's just and reasonable for
24 another.

25 Obviously the FCC -- the ILECs went back, after

1 the FCC identified this test, and, for a different purpose,
2 attempted to convince the FCC that they shouldn't be
3 required to make loops and transport available because they
4 made special access available, and the FCC was quite firm in
5 its rejection of the view that special access was sufficient
6 to enable local competition. I think they went so far as to
7 call it a hideous irony, a phrase that I don't recall the
8 FCC using in any other order.

9 Q Let me talk to you about that, Mr. Gillan.
10 Because I think what you've done, in my opinion, is confuse
11 two parts of the order. The paragraph that you talk about
12 is in the section of the triennial review remand order --

13 MR. MAGNESS: Commissioners, Ms. Foshee has now
14 just prefaced this question with her opinion of what the law
15 is.

16 MS. FOSHEE: I'll rephrase.

17 MR. MAGNESS: And if she has a question --

18 CHAIRMAN WISE: Please do.

19 MS. FOSHEE: I'll rephrase.

20 BY MS. FOSHEE:

21 Q Mr. Gillan, the portion of the TRRO to which you
22 are referring, that is in the section of the order that
23 talks about the impairment test; is it not?

24 A Yes.

25 Q And that is the section in which the RBOCs argued

1 that special access should be counted in the impairment test
2 as a competitive alternative; correct?

3 A Yes. And that caused the FCC to have to look at
4 whether or not there was any evidence to suggest that
5 special access rates are sufficient for there to be a
6 competitive local marketplace. And I did include in my
7 answer, however, earlier, that it was for a different
8 purpose. I've recognized that the FCC was talking about
9 impairment, and not just and reasonable.

10 I also point out to you that it's my testimony
11 that impairment findings and just and reasonable are two
12 different topics, and it's your company's position that they
13 should be treated the same.

14 Q Sure, we made that argument to the FCC, and the
15 FCC rejected it; right?

16 A Yes. But I don't think -- I think you failed to
17 see my point. I was pointing out that impairment analysis
18 and just and reasonable analysis can be different, as -- as
19 you're showing in terms of this discussion.

20 Q Well, what the FCC did -- and I'll be happy to
21 show it to you -- in the TRRO, after it did the impairment
22 test and said, "Um, sorry, RBOCs, you're not allowed to use
23 special access as a competitive alternative for purposes of
24 finding impairment."

25 It then went on --

1 MR. MAGNESS: Mr. Chairman, I'm going to object
2 again. She's stating her view of what the FCC did in the
3 order. She's not asking the witness questions.

4 MS. FOSHEE: I will ask him a question if I'm
5 allowed to finish.

6 MR. MAGNESS: Well, but --

7 COMMISSIONER BAKER: (Presiding) I -- okay.

8 MR. MAGNESS: -- the question's prefaced with a
9 speech about what BellSouth's view of what the FCC order
10 did.

11 COMMISSIONER BAKER: Okay, thank you, Mr. Magness.
12 I understand.

13 MR. MAGNESS: That's not cross-examination.

14 COMMISSIONER BAKER: Ms. Foshee, you can lead the
15 witness all you want. But, I mean --

16 You can lead him. But, you know, I believe
17 -- don't share -- you know, Mr. Gillan, I'm sure, can take
18 care of himself, and he's got competent counsel. But, I
19 mean, ask the leading question and --

20 MS. FOSHEE: Okay.

21 COMMISSIONER BAKER: -- and move on.

22 BY MS. FOSHEE:

23 Q Did the FCC, in paragraph 142, and I --
24 Do you have the TRRO in front of you?

25 A No, but actually I don't need it for this.

1 Q Okay. Did the FCC, in paragraph 142, subsequent
2 to the paragraph that you cited in your testimony, state
3 "Specifically for DS1 and DS3 transport, we adopt a 12-month
4 plan to -- for competing carriers to transition to
5 alternative facilities or arrangements, including self-
6 provided facilities, alternative facilities offered by other
7 carriers, or special access services offered by the
8 incumbent LEC."

9 A Yes, I believe you read that correctly.

10 Q Okay. And, in fact, with the high cap loops and
11 transport impairment test, that was done on a wire center
12 basis; correct?

13 A They decided to use a wire center as a proxy for
14 other factors, yes.

15 Q Okay. But even if the Commission took to heart
16 your criticism that the switching -- the non-impairment
17 finding for switching was done on a nationwide basis, and so
18 it didn't have the necessary granularity, which I believe is
19 an argument you make, that would not at all be true in the
20 case of loops and transport, would it? Because that was
21 done on a wire center basis; correct?

22 A Ms. Foshee, I haven't a clue where you got a
23 discussion about -- in this docket, in this testimony,
24 anything to do with my discussion about nationwide
25 impairment of switching.

1 Q Okay, that's -- well, that's good, then. Do you
2 agree, then, that the FCC did find competitive alternatives
3 for switching on a nationwide basis?

4 A No, I believe that the FCC decided that it would
5 find a -- reach a finding of non-impairment.

6 Q Okay.

7 A Now, the FCC has gone to great lengths in the
8 Omaha forbearance order to point out that when it did non-
9 impairment analyses, it was over -- it was deliberately
10 over-inclusive. So it was taking things away from CLECs in
11 more places than they thought -- than -- than it believed
12 that a more detailed, factual analysis would even
13 demonstrate.

14 But we've never got past the fact that you and I
15 disagree about something more fundamental. The FCC does not
16 say, and has never said, non-impairment means there's enough
17 competition to keep you from charging unreasonable rates for
18 facilities and services used to provide local exchange
19 services. Special access was identified as something that
20 you might look at here. The FCC itself later looked at it
21 and concluded, at least in the terms of -- for impairment,
22 but it concluded that there's no evidence that special
23 access pricing permits you to have a competitive local
24 exchange market.

25 I think even more fundamental is Congress knew